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Supreme Court of the United States

OCTOBER TERM, 1964

PAN AMERICAN-GRACE AIRWAYS, INC., and BRANIFF AIRWAYS, INC., *Petitioners*,

v.

CIVIL AERONAUTICS BOARD, LUFTHANSA GERMAN AIRLINES, PAN AMERICAN WORLD AIRWAYS, INC., and MASTER EXECUTIVE COUNCILS OF PILOTS OF BRANIFF AIRWAYS, INC., AND PAN AMERICAN-GRACE AIRWAYS, INC., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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January 1965

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit dismissing petitions for review of an order of the Civil Aeronautics Board that denied contemporaneous, comparative hearing and consideration of petitioners' applications for airline route licenses with the mutually exclusive application of Lufthansa German Airlines for a license to operate the same airline route.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 2025-43)[1] is not yet reported. It is set forth as Appendix B hereto, pp. 7a-23a, *infra*. The order of the Civil Aeronautics Board (J.A. 51-53) is not reported and is printed as Appendix C hereto, pp. 24a-26a, *infra*.

JURISDICTION

The judgment of the Court of Appeals dismissing the petitions for review was entered on October 30, 1964. (R. 2045; App. D, p. 27a, *infra*). The order of the court denying petitioners' timely-filed petition for rehearing en banc was entered on December 11, 1964. (R. 2045-A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether United States air carriers, which have filed applications under Section 401 of the Federal Aviation Act for licenses to operate an international airline route, are entitled to contemporaneous, comparative hearing and consideration of their applications with the mutually exclusive application of a foreign air carrier under Section 402 of the Act for a license to operate the same airline route.

STATUTES AND EXECUTIVE AGREEMENT INVOLVED

The statute principally involved is the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. § 1301 *et seq.* Pertinent provisions of Sections 102, 401, 402, 801 and 1102 thereof are set forth in Appendix A hereto, pp.

[1] References "(R. ...)" are to the record of proceedings in the court below filed in this Court. References "(J.A. ...)" are to the page numbers of the joint appendix printed for the use of the court below, which is included in the record certified to this Court.

1a-4a, *infra*. Also involved are provisions of the Air Transport Agreement and Related Exchange of Notes Between the United States of America and the Federal Republic of Germany, July 7, 1955, 7 U.S.T. & O.I.A. 527, T.I.A.S. 3536, which are also set forth in Appendix A, pp. 5a-6a, *infra*.

STATEMENT

Petitioners Panagra and Braniff are United States flag air carriers that have routes down the west coast of South America. The route of neither carrier extends as far north as New York. The Braniff route terminates at Miami on the east coast of the United States and the Panagra route at Balboa, Canal Zone. Both petitioners participate in the provision of through-plane service between New York and South America by interchange arrangements with other carriers; these interchange flights make several intermediate stops. Each of the petitioners filed with the respondent Civil Aeronautics Board in 1962 an application for a license extending its route to New York by way of points that include Kingston and Montego Bay, Jamaica. (J.A. 113-15, 116-17). Those applications have been consolidated by the Board into the *United States-Caribbean-South America Investigation*, CAB Docket No. 12895, a major route case in which present-day air service needs between the United States and South America will be considered by the Board.

The Board's order instituting this investigation (J.A. 54-60) is familiar to this Court; it was printed as an appendix to the Court's opinion in *Pan American World Airways* v. *United States*, 371 U.S. 296, 314 (1963). In it the Board stated its tentative determination that the available traffic would support only one United States airline between the United States and

points on the west coast of South America. (J.A. 58; see J.A. 62). This determination was based upon an elaborate study by the Board's staff (J.A. 58; see J.A. 60-86), and in large part the lack of traffic potential for United States carriers was attributed to the services provided by foreign flag carriers operating between the United States and South America (J.A. 56; see J.A. 67-68, 79-86).

The hearings in this investigation are scheduled to be conducted this coming spring. Meanwhile, the Board on March 10, 1964, received an application from the respondent Lufthansa German Airlines for a license extending its route from New York to the very points in the Caribbean and South America for which Panagra and Braniff both are applicants: Kingston and Montego Bay, Jamaica; Quito and Guayaquil, Ecuador; Lima, Peru; and Santiago, Chile. (J.A. 5-7). Lufthansa already has routes linking South America and its home country, West Germany, but it has no authority to conduct operations between New York (a terminal of one of its routes from Europe to the United States) and points in the Caribbean or in South America.

Panagra and Braniff moved to consolidate Lufthansa's application and their applications for identical authority, alleging that the applications were mutually exclusive, *i.e.*, that because of the lack of sufficient traffic potential not all of the applications could be granted. (J.A. 21-27, 29-31). The Board denied these motions and set Lufthansa's application for expedited hearing. (J.A. 51-53; pp. 24a-26a, *infra*).

Panagra and Braniff filed petitions for review of the Board's order denying consolidation in the Court of Appeals for the District of Columbia Circuit under Section 1006 of the Federal Aviation Act, 72 Stat. 795, 49 U.S.C. § 1486. On petitioners' motions the court

stayed the Board proceedings on Lufthansa's application pending its final disposition of the petitions for review or until further order of the court. (R. 2046-48). A motion of Lufthansa to dismiss the petitions for want of jurisdiction was denied (R. 2049) as were subsequent motions of the Board and Lufthansa to dissolve the stay (R. 2050-52).

After briefing and argument a three-judge panel of the Court of Appeals decided, with Judge McGowan dissenting, that petitioners were not entitled to a comparative hearing with Lufthansa on their respective applications for licenses for the same airline route because the issuance of permits to foreign air carriers involves different considerations from those involved in determining whether certificates should be issued to United States carriers. Therefore, the court ruled, the Board's order deprived petitioners Panagra and Braniff of no legal rights and so it was non-final and non-reviewable, and the petitions were ordered dismissed. It was immaterial, on the view of the majority of the court, that the award of a permit to Lufthansa might in fact preclude, as a matter of economics, an award of a certificate to either or both of petitioners. (R. 2025-33; pp. 7a-13a, *infra*).

A petition for rehearing en banc was denied (R. 2045-A), and thereafter the Court granted petitioners' motion to stay transmission of its mandate to the Board pending this Court's action on a petition for certiorari to be filed on or before January 13, 1965.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals for the District of Columbia Circuit affects the administration of the Federal Aviation Act in an important class of cases before the Civil Aeronautics Board. The court

decided that Congress meant by key provisions of the Act to authorize the granting of a license to a foreign carrier to operate an airline route to the exclusion of citizen applicants for the same route without affording the citizen applicants a meaningful hearing on their applications.[2] The decision poses an important question of federal law that has not been and should be decided by this Court.

In the case of applicants for federal licenses generally the answer to the question posed in this case is provided by this Court's decision in *Ashbacker Radio Corp.* v. *FCC,* 326 U.S. 327 (1945). The doctrine established by that case is that where there are two or more applicants for licenses for the same authority, entitled as are petitioners and Lufthansa by the terms of the Federal Aviation Act to hearings on their applications, and there is, physically or economically, room for less than all of them, their applications must be heard and considered together.

> "[W]here two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." *Id.* at 333.

Petitioners' applications were filed under Section 401 of the Federal Aviation Act, and by an unbroken line of decisions of the lower federal courts there is no doubt that the right to a hearing conferred by that section ordinarily would entitle petitioners to the protection of the *Ashbacker* doctrine. *Delta Air Lines* v.

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[2] Petitioners are corporations. "Citizen of the United States" is defined by § 101(13) of the Federal Aviation Act to include a corporation organized under United States law of which the president and two-thirds of the board of directors are citizens and in which three-quarters of the voting interest is held by citizens.

CAB, 275 F. 2d 632 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 969 (1960); *Delta Air Lines* v. *CAB*, 228 F. 2d 17 (D.C. Cir. 1955); *Northwest Airlines* v. *CAB*, 194 F. 2d 339 (D.C. Cir. 1952); *Western Air Lines* v. *CAB*, 184 F. 2d 545 (9th Cir. 1950).

The majority of the court below decided that petitioners were not entitled to have their applications heard with Lufthansa's application because "quite different considerations bear upon Lufthansa's application and those of petitioners . . . ." (R. 2030; p. 11a, *infra*).

The court discussed the sources from which the difference in considerations was thought to arise. The first of these is an executive agreement concluded between this country and the Federal Republic of Germany in 1955. A schedule to the agreement provides for, among others, a route for a carrier designated by the German Government between Germany and cities in the United States including New York "and beyond to points in the Caribbean Sea and beyond to South America." (p. 6a, *infra*). The agreement is specific that the German carrier may be required to "qualify before the competent aeronautical authorities of . . . [the United States], under the laws and regulations normally applied by these authorities, before being permitted to engage in the operations contemplated by this Agreement." (Art. 3, p. 5a, *infra*).

"[T]he laws and regulations normally applied by" the Civil Aeronautics Board, which is the United States aeronautical authority referred to in the bilateral agreement, see Art. 1(a), p. 5a, *infra*, are set forth in Sections 402 and 801 of the Federal Aviation Act, which the court below next turned to. By Section

402 the Board "is empowered" to issue a permit to a foreign air carrier to operate over a route between this country and some other after notice and hearing and upon findings that the carrier is fit, willing and able to perform the transportation and to conform to applicable laws and regulations and that the transportation for which the permit is sought "will be in the public interest." Lufthansa's application was filed under Section 402. Section 801 makes a Board order granting (or denying) a foreign air carrier permit subject to the approval of the President.

Petitioners filed their applications pursuant to Section 401 of the Federal Aviation Act, which provides that after notice and hearing the Board "shall issue a certificate" granting the whole or any part of the authority sought in the application if it finds the applicant fit, willing and able to perform the transportation and to conform to applicable laws and regulations and that the transportation is required by the public convenience and necessity. Section 801 makes the President the final judge of whether petitioners' applications under Section 401 for certificates of public convenience and necessity covering routes extending beyond the United States should be granted, just as he is the final judge of whether Lufthansa's application under Section 402 for a public interest permit should be granted. No "different considerations" arise from the ultimate power of the President, then, because the situation is the same as to all three carriers.

Whatever "different considerations" there may be must derive from Section 1102 of the Act, which directs the Board to exercise its powers under the Act consistently with obligations assumed by the United States through treaty or executive agreement. It was ap-

parently this statutory provision, and the United States-German executive agreement describing in vague terms a route from New York to South America that a German carrier might seek to qualify to operate, that led the court below to say that the "public interest" test that must be satisfied by a foreign air carrier permit applicant under Section 402 differs from the test of the "public convenience and necessity" to which a United States airline is subject by Section 401. The fact is, however, that Section 102 of the Act directs the Board to consider the same factors both as being in the public interest and as being in accordance with the public convenience and necessity. The two phrases are interchangeable. See *United Air Lines Transport Corp.*, 1 C.A.A. 778, 779-80 (1940).

There is a difference between Section 402 and Section 401. By Section 402 the Board "is empowered," not directed, to issue a foreign air carrier permit when it finds the applicant fit and its proposed service in the public interest. By contrast, Section 401 provides that the Board "shall issue" a certificate to a citizen carrier when it makes the statutory findings concerning fitness and the public convenience and necessity. This is a quite natural Congressional direction that even a qualified foreign applicant ordinarily obtains its permit to carry passengers and freight in and out of the United States as a matter of grace, whereas the qualified citizen applicant is entitled to a certificate as a matter of right. The apparent significance of Section 1102 in this statutory scheme is that when the section is applicable, *i.e.*, when the route for which a permit is sought is the subject of an international agreement, the permit must be granted if the applicant satisfies the statutory criteria by proving at a hearing that it

is fit and that its service will be in the public interest. Section 1102 by its terms does not alter the governing public interest criterion.

Even if, however, the public interest test under Section 402 does differ in some way from the public convenience and necessity test under Section 401, as the court below believed, it does not follow that the Board may lawfully deny a citizen applicant a comparative hearing with a foreign applicant when their applications are mutually exclusive. A comparative assessment may be more difficult if the criteria are different, but it is the mutual exclusivity of applications, not the sameness of criteria, that entitles the usual license applicants to comparative hearing and consideration. *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945). The decision of the court below can be sustained, we submit, only if Section 1102 is construed to override altogether the public interest test of Section 402. The Board has denied that the provision is properly so construed. It has denied that Section 1102 means that a foreign air carrier permit shall be granted as in the "public interest" whenever the route for which the permit is sought is covered by an international agreement. *British-Overseas Airways Corp.*, 29 C.A.B. 583, 593 (1959).[3]

In any event, the question whether Congress meant that Section 1102 should have this effect, or that the provisions of law cited by the court below in combination mean that a foreign carrier's application can be

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[3] See also the quotation from the Board's brief in the court below set out in Judge McGowan's dissenting opinion: The Board said that it "considers that it is not required to recommend issuance of a foreign air carrier permit to the President merely because there is an agreement providing for such permit." (R. 2040; p. 20a, *infra*).

granted without United States carriers' having been heard on mutually exclusive applications, is appropriately one for resolution by this Court. This Court alone can authoritatively decide whether a foreign line's application can lawfully be granted without a domestic carrier's having had a meaningful opportunity to prove that it could perform the service needed on the route as well as the foreign line or better. The question is important as well as novel.

2. The court below cast its opinion and judgment in terms of jurisdiction, ordering the petitions for review dismissed. Its decision, however, was actually on the merits of the novel and important question of law we have just described. The court said that "in the conventional case deprivation of . . . [an *Ashbacker*] hearing to a party entitled thereto would have such aspects of finality as to be reviewable." (R. 2030; p. 11a, *infra*). An order effecting such a deprivation satisfies the test laid down by this Court in *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 112-13 (1947), that "administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process."

"Under this test, a final order need not necessarily be the very last order." *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, 55 (D.C. Cir. 1954), *cert. denied*, 347 U.S. 990 (1954). Where only one of two license applications can be granted, an order refusing a comparative hearing to one of the applicants effectively denies him a substantial right. This makes it a final order for purposes of review. The court below dismissed for want of jurisdiction only because of its conclusion that, on account of differences in considerations arising from the statute, petitioners were not entitled

to a comparative hearing and therefore had not been deprived of any such right. The decision was on that question of law.

The court thus quite properly eschewed the basis on which the Board placed its order denying consolidation of the three applications. The Board, which held no hearing but decided the matter on pleadings, said that it was "not persuaded that grant of Lufthansa's application would, as a matter of economic fact, preclude the subsequent grant of Braniff's application." (J.A. 52).[4] The statement cannot be squared with what the

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[4] Among the reasons given by the Board for not being persuaded that there was in fact any mutual exclusivity was that "Lufthansa's schedules would be subject to the capacity provisions" of the agreement between the United States and Germany and that "Lufthansa would be required to tailor its capacity offered between the U.S. and South America to the traffic demands between Germany and the South American points in question." (J.A. 52). Capacity controls are chimerical. In a report that dealt at this point with the very provision of the United States-German agreement relied upon by Lufthansa, the Senate Interstate and Foreign Commerce Committee said that policing capacity

> "would ultimately reduce the level of frequencies to so low a number as to produce complaints of unfairness. Diplomatically, this would be difficult; *practically, it has never been done before.*
>
> "Our Government appears to have concluded that, once a route has been granted which is economically sustainable by the traffic moving between its termini because that is the most direct routing between those points, then the carriers should be left considerable freedom to operate the amount of capacity over that route to provide adequate service to the public. This is substantially the interpretation given by the CAB spokesman in his further testimony." S. Rep. No. 1875, 84th Cong., 2d Sess. 18-19 (1955). (Emphasis in original.)

Foreign air carriers have resisted, so far successfully, efforts to compel them even to *report* their traffic statistics to the Board. See British Overseas Airways Corp. v. CAB, 304 F.2d 952 (D.C. Cir. 1962); Initial Decision of Examiner Edward T. Stodola, CAB Docket No. 12063, June 21, 1962.

Board said in its order instituting the *South America Investigation.*

In that order the Board indicated that perhaps only one United States carrier should be authorized to serve the route from New York to the west coast of South America because of insufficient traffic in the markets involved. The Board attributed that problem in large part to services by foreign flag carriers over the route, saying:

> "Not only do these services rendered by non-U.S. flag carriers dilute the potential economic support for the services of the U.S. carriers, but also they bring into question the need for point-to-point duplication of such services." (J.A. 56).

There was thus at the very least a serious question of mutual exclusivity on the face of the Board's own prior findings. Ordinarily an applicant is entitled in those circumstances to attempt to sustain its allegation of actual mutual exclusivity in a comparative hearing. *Delta Air Lines* v. *CAB,* 275 F. 2d 632 (D.C. Cir. 1959), *cert. denied,* 362 U.S. 969 (1960); *Delta Air Lines* v. *CAB,* 228 F. 2d 17 (D.C. Cir. 1955). That was the view of Judge McGowan in dissent. He said that he considered the Board's order final and therefore reviewable because it "effectively put an end to petitioners' opportunity to press their claim of right to an *Ashbacker* determination, either on the record as it stood at the time the order was entered or after the receipt by the Board in the future of evidence on the exclusivity issue." (R. 2034; p. 15a, *infra*).[5]

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[5] This case does not involve any of the rules that agencies, particularly the Civil Aeronautics Board, have devised to channel *Ashbacker* claims in the interest of orderly procedure. There is no question of timely filing of competitive applications or motions to consolidate such applications, or of anything like a requirement that to avoid proliferation of issues an applicant for authority

Petitioners, to be sure, were admitted as intervenors in the proceeding on Lufthansa's application, but, as the court below said after reciting this fact, "denial of a comparative hearing with Lufthansa may preclude petitioners from showing economic superiority over Lufthansa in operating the route in question." (R. 2029; p. 10a, *infra*).

3. Petitioners do not believe that there are in this case any of the considerations that underlie this Court's holding in *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1947). Section 1006 of the Federal Aviation Act, the judicial review provision of the Act, excepts from review in the courts of appeals "any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 801 of this Act. . . ." In the *Waterman* case this Court decided that orders affecting domestic air carriers' certificates subject to Presidential approval under Section 801 likewise could not be judicially reviewed.

The Board and Lufthansa urged below that the court lacked jurisdiction because, as it was put by the

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partially within and partially without the geographical confines of a major airline route case must substantiate in the course of the case his claim of mutual exclusivity with applications for authority between points wholly within the area covered by the proceeding. See Eastern Air Lines v. CAB, 271 F.2d 752, 756-57 (2d Cir. 1959), *cert. denied*, 362 U.S. 970 (1960); National Airlines v. CAB, 249 F.2d 13 (D.C. Cir. 1957). Here there is point-to-point duplication. Certainly after the decision of the court below that conclusive proof of mutual exclusivity would not entitle them to a comparative hearing, it would be futile for petitioners to attempt to make such proof in the Lufthansa application proceeding, even assuming that the Board would permit them to do so; it has never said that it would so permit them. *Cf.* National Airlines v. CAB, *supra* at 14-15.

Board, "ultimate decision in the Board's proceedings is committed to the President." Judge Wright, specially concurring below, accepted the contention. (R. 2033-34; p. 14a, *infra*). We do not believe that anything in the *Waterman* case requires that the exception from reviewability stated in Section 1006 be extended to include any order dealing with a foreign carrier permit or a certificate of public convenience and necessity for foreign air transportation even though that order is not subject to approval of the President. The court below at least assumed the correctness of our belief in *Seaboard & Western Airlines* v. *CAB*, 181 F. 2d 777, 779 (D.C. Cir. 1949), where it said that an order denying comparative consideration of mutually exclusive applications for international certificates would be reviewable. See also footnote 1 of Judge McGowan's dissenting opinion below. (R. 2035; p. 15a, *infra*).

If renewed here, the jurisdictional contention of the Board and Lufthansa would itself present a question meriting this Court's attention.

Petitioners' views on the question, in brief, are these: The order that is under review here was not subject to the approval of the President. It was not submitted to him or approved by him. It is fully effective without his approval. Of course, the ultimate decision whether Lufthansa should be awarded the permit it seeks or petitioners the certificates they seek is for the President. Petitioners simply seek to have placed before the Board for its recommendation to the President and before the President for his appraisal and decision their qualifications for operating the New York-South America route at the same time that Lufthansa's qualifications are presented. This they believe is their right

because of the likelihood the Board has found to exist that one or more of the applicants, for reasons of economics, cannot receive an award. For a court to direct that petitioners have this opportunity is not an intrusion into Presidential prerogatives or otherwise beyond judicial power. It is an exercise of the traditional judicial function of assuring fair play and a fair hearing, which is the genius of the *Ashbacker* doctrine.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

A. Pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. § 1301 *et seq.*, read as follows:

DECLARATION OF POLICY: THE BOARD

§ 102. In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

* * *

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

§ 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Application for Certificate

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

Notice of Application

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for a public hearing, and the Board shall dispose of such application as speedily as possible.

Issuance of Certificate

(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

* * *

PERMITS TO FOREIGN AIR CARRIERS

Permit Required

§ 402. (a) No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage.

Issuance of Permit

(b) The Board is empowered to issue such a permit if it finds that such carrier is fit, willing, and able properly to perform such air transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation will be in the public interest.

Application for Permit

(c) Application for a permit shall be made in writing to the Board, shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall be regulation require.

Notice of Application

(d) Upon the filing of an application for a permit the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a permit. Such application shall be set for public hearing and the Board shall dispose of such application as speedily as possible.

* * *

THE PRESIDENT OF THE UNITED STATES

§ 801. The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms,

conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof.

* * *

INTERNATIONAL AGREEMEENTS

§ 1102. In exercising and performing their powers and duties under this Act, the Board and the Administrator shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries, and shall take into consideration any applicable laws and requirements of foreign countries and the Board shall not, in exercising and performing its powers and duties with respect to certificates of convenience and necessity, restrict compliance by any air carrier with any obligation, duty, or liability imposed by any foreign country: *Provided,* That this section shall not apply to any obligation, duty, or liability arising out of a contract or other agreement, heretofore or hereafter entered into between an air carrier, or any officer or representative thereof, and any foreign country, if such contract or agreement is disapproved by the Board as being contrary to the public interest.

B. Pertinent provisions of the Air Transport Agreement and Related Exchange of Notes Between the United States of America and the Federal Republic of Germany, July 7, 1955, 7 U.S.T. & O.I.A. 527, T.I.A.S. 3536, read as follows:

ARTICLE 1

(a) The term "aeronautical authorities" shall mean in the case of the United States of America, the Civil Aeronautics Board and any person or agency authorized to perform the functions exercised by the Civil Aeronautics Board and, in the case of the Federal Republic of Germany, the Federal Minister of Transport and any person or agency authorized to perform the functions exercised by the said Federal Minister of Transport.

• • •

ARTICLE 2

(1) Each contracting party grants to the other contracting party rights necessary for the conduct of international air services by the designated airlines, as follows: the rights of transit, of stops for non-traffic purposes, and of commercial entry and departure for international traffic in passengers, mail and cargo at the points in its territory named on each of the routes specified in accordance with paragraph (2).

(2) The routes over which the designated airlines of the two contracting parties will be authorized to operate will be specified in a Route Schedule, mutually agreed upon, and set forth in an exchange of diplomatic notes.

ARTICLE 3

Air service on a specified route may be inaugurated by an airline or airlines of one contracting party at any time after that contracting party has designated such airline or airlines for that route and the other contracting party has given the appropriate operating permission. Such other party shall, subject to Article 4, be bound to give this permission provided that the designated airline or airlines may be required to qualify before the competent aeronautical authorities of that party, under the laws and

regulations normally applied by these authorities, before being permitted to engage in the operations contemplated by this Agreement.

* * *

The Secretary of State to the Chargé d'Affaires ad interim of the Federal Republic of Germany

Department of State
Washington

July 7, 1955

Sir:

I refer to paragraph 2 of Article 2 of the Air Transport Agreement between the United States of America and the Federal Republic of Germany, signed on July 7, 1955.

In the negotiations which have been conducted in connection with the above-mentioned Agreement, it has been agreed that air services may be operated in accordance with the following route schedule.

Route Schedule

* * *

B. An airline or airlines designated by the Government of the Federal Republic of Germany shall be entitled to operate air services on each of the air routes specified via intermediate points, in both directions, and to make scheduled landings in the United States of America at the points specified in this paragraph:

1. From the Federal Republic of Germany via intermediate points to Boston, New York and Philadelphia and beyond to points in the Caribbean Sea and beyond to South America.

* * *

For the Secretary of State:

Herbert Hoover, Jr.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18671

PAN AMERICAN-GRACE AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
MASTER EXECUTIVE COUNCILS OF PILOTS OF BRANIFF AIRWAYS, INC., AND PAN AMERICAN-GRACE AIRWAYS, INC., LUFTHANSA GERMAN AIRLINES AND PAN AMERICAN WORLD AIRWAYS, INC., INTERVENORS

No. 18672

BRANIFF AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
MASTER EXECUTIVE COUNCILS OF PILOTS OF BRANIFF AIRWAYS, INC., AND PAN AMERICAN-GRACE AIRWAYS, INC., LUFTHANSA GERMAN AIRLINES AND PAN AMERICAN WORLD AIRWAYS, INC., INTERVENORS

On Petitions for Review of an Order
of the Civil Aeronautics Board

Decided October 30, 1964

Before FAHY, WRIGHT and McGOWAN, *Circuit Judges.*

FAHY, *Circuit Judge:* Petitioners, Braniff Airways, Inc., and Pan American-Grace Airways, Inc., are domestic air carriers. They petition for review of an order of the

Civil Aeronautics Board denying a motion by Braniff, supported by Pan American-Grace, that an application previously made to the Board by Lufthansa German Airlines, intervenor, to amend its foreign air permit be consolidated with the pending United States-Caribbean-South American Investigation, known as the South American Route Case, or that the Board defer proceedings on Lufthansa's application until decision in the Route Case.

Petitioners moved in this court for a stay of the Board's proceedings in the Lufthansa case pending our review. We granted the stay. Lufthansa moved in this court that the petitions be dismissed. We denied this motion. Thereafter several American airlines which operate in the Federal Republic of Germany, herein referred to as Germany, and points beyond, under reciprocal rights granted in a bilateral Executive Agreement between the United States and Germany, were allowed to intervene or file briefs. The Master Executive Councils of Pilots of certain airlines were also allowed to intervene.

The motion before the Board to consolidate and defer, the denial of which is sought to be reviewed, was filed by Braniff as an intervenor in the case involving Lufthansa's application pursuant to Section 402 of the Federal Aviation Act, 72 Stat. 757, 49 U.S.C. § 1372 (1958), for an extension of its Europe to New York air route to points in South and Central America, in accordance with the bilateral Executive Agreement referred to. This Agreement grants to designated German carriers rights of transit in the United States, the specific routes to be set forth in an exchange of diplomatic notes.[1] Pursuant to this procedure the Secretary of State specified points in the United States and "points in the Caribbean Sea and be-

[1] Air Transport Agreement between the Federal Republic of Germany and the United States of America, Article 2, signed July 7, 1955. 7 U.S.T. & O.I.A. 527 (1956).

yond to South America."[2] The Agreement also requires the foreign carrier to qualify under the "laws and regulations normally applied" by the regulating body, the Board in this case.

The route sought by Lufthansa is essentially that involved in the Route Case. If its application were granted Lufthansa would serve substantially the same points as are presently served by petitioners, who are parties in the Route Case.

The Route Case grew out of a study by the Board staff which indicated that due to the economics of the situation, and because of foreign competition in the area, the public interest could be served more efficiently with newly designnated route patterns in place of routes presently operated by the two American airlines. Moreover, the Board has tentatively decided that only one American airline should operate from the United States to the western coast of South America; this route has several applicants including petitioners. The Route Case has spawned other issues, is very complicated, and hearings in the case will not begin until January 1965.

In support of its claim of right to consolidation and deferment Brainiff urges that comparative hearings are required under the *Ashbacker* doctrine, *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), since, it contends, the applications of petitioners and Lufthansa are mutually exclusive as a matter of economics. In denying the motion the Board said that assuming *arguendo* the doctrine were applicable "to this type of situation," the requisite showing of mutual exclusivity was not made, pointing out that Lufthansa's traffic along the South American route would be sharply restricted by the terms of the bilateral

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[2] Route Schedule made and agreed to by the Governments of Germany and the United States pursuant to Article 2 of the Air Transport Agreement. 7 U.S.T. & O.I.A. 527, 557 (1956).

Agreement. The Board also found no need to defer the Lufthansa application since it felt that public interest factors could be assessed without reference to the Route Case and because, as a matter of policy, foreign carrier applications should be expedited.

As intervenors before the Board petitioners will be able to submit evidence to the Board relating to Lufthansa's diversion of business from domestic carriers operating in the same area. But denial of a comparative hearing with Lufthansa may preclude petitioners from showing economic superiority over Lufthansa in operating the route in question.[3]

We think the petitions must be dismissed for lack of jurisdiction in this court. Our jurisdiction depends upon Section 1006 of the Act, set forth in the margin.[4] Though the action denying consolidation and postponement was by means of an order, reviewable orders do not, ordinarily, include such interlocutory or procedural orders:

> administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the ad-

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[3] Of course both petitioners will participate in comparative hearings in the Route Case, to which only domestic carriers are parties.

[4] Sec. 1006. (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore. 72 Stat. 795 (1958), as amended by 74 Stat. 255 (1960), 75 Stat. 497 (1961), 49 U.S.C. § 1486 (1958).

ministrative process. *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U.S. 299; *United States* v. *Illinois Central R. Co.*, 244 U.S. 82; *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 131.

Chicago & Southern Air Lines v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948).

Petitioners contend that the order denying consolidation does deny them the substantial right to an *Ashbacker* hearing with Lufthansa. In the conventional case deprivation of such a hearing to a party entitled thereto would have such aspects of finality as to be reviewable:

> If the effect of the order denying consolidation in the case at bar were effectually to preclude Seaboard from rights which it otherwise would have, the order would be final as to Seaboard. It follows, as it frequently does in jurisdictional cases, for example, in the WJR case,[9] that we must consider and decide a portion of the controversy on the merits in order to determine whether we do or do not have jurisdiction.
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> [9] WJR, The Goodwill Station, Inc., v. Federal Communications Comm., 1949, 85 U.S.App.D.C. 392, 178 F.2d 720 (on mandate of Supreme Court).

Seaboard & Western Airlines v. *CAB*, 86 U.S.App.D.C. 9, 11, 181 F.2d 777, 779 (1949). And see *Delta Air Lines, Inc.* v. *CAB*, 97 U.S.App.D.C. 46, 49, 228 F.2d 17, 20 (1955); *cf. West Coast Exploration Co.* v. *McKay*, 93 U.S. App.D.C. 307, 318, 213 F.2d 582, 593 (1954).

Petitioners are not entitled to obtain review of the present order under the principle referred to, because they are not, in our view, entitled to an *Ashbacker* hearing with Lufthansa. Quite different considerations bear upon Lufthansa's application and those of petitioners in the Route Case. The bilateral Executive Agreement grants Germany the right to designate a carrier to operate air services to and from

> the Federal Republic of Germany via intermediate points to Boston, New York and Philadelphia, and

beyond to points in the Caribbean Sea and beyond to South America.[5]

The right thus claimed to be exercised on behalf of Lufthansa is reciprocal to the right under the Agreement granted to American domestic air carriers by Germany.

The manner in which the Federal Aviation Act dovetails into this situation is set forth in Sections 402 and 801. Under Section 402 a foreign air carrier may be granted a permit by the Board if it finds that the carrier is fit, willing and able properly to perform air transportation and to conform to the provisions of the Act, "and that such transportation will be in the public interest." 72 Stat. 757, 49 U.S.C. § 1372 (1958). Section 801 provides that the issuance or amendment of any permit to a foreign air carrier under Section 402 "shall be subject to the approval of the President." 72 Stat. 782, 49 U.S.C. § 1461 (1958).

From the foregoing it is seen that the obligation of the Board as an agent of the United States in connection with Lufthansa's application involves Presidential consideration of our international relations with Germany as they arise with respect both to Lufthansa and American domestic carriers operating abroad. Such considerations are not involved in the applications of petitioners, though the route sought by them and Lufthansa may be the same and the competition of each may be affected by the operations of the other.

Petitioners contend that the criteria set forth in Section 102 of "public interest," pertinent to foreign air carrier applications under Section 402, compels the Board to consider the same factors as are involved in determining the "public convenience and necessity" applicable to a domestic carrier under Section 401. But the public interest has many facets. Under Section 102 of the Act the Board

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[5] Supra note 2.

may consider other criteria than those therein specifically mentioned. And Section 1102 directs the Board to act consistently with obligations assumed by the United States in bilateral Agreements. We cannot carry the use of phraseology of similar character in the two sections to the point of overcoming the fact that the public interest involved in our obligations under the bilateral Agreement cannot be equated with the public convenience and necessity referred to in Section 401.

The public interest factors to be considered in cases arising under Section 401, including the Route Case, are primarily economic. Where the public interest referred to in Section 102 is to be considered, and superiority in one or more of the public interest factors is relevant to the grant of an application, an *Ashbacker* hearing insures an element of fairness in choosing among mutually exclusive applications. But neither our obligations under bilateral Agreements nor the motives for concluding them are subjects for comparative hearings. In the Lufthansa case, comparative considerations, bearing primarily upon economics, would do little to dilute the public interest factor which perhaps weighs most heavily, that is, the policy and obligations of the United States set forth in the bilateral Agreements.

Under this view of the case we do not reach the issues of mutual exclusivity or of alleged absence of findings of fact to support the Board's order. We hold only that since petitioners are not entitled to an *Ashbacker* hearing, the order remains interlocutory and non-reviewable.

The avenue open to petitioners through their permitted intervention in the Lufthansa case before the Board cannot now be said by us to be so restricted that petitioners will be precluded from making available to the Board, and through the Board to the President, such matters affecting the public interest as will meet the requirements of due process of law.

Dismissed for lack of jurisdiction.

WRIGHT, *Circuit Judge, concurring*: I concur in the court's opinion.

These proceedings, in my judgment, are an attempt, by the carriers now enjoying the international routes in suit, to frustrate executive action by this Government with respect to its contract obligation to the West German Government. I agree that neither this court nor the Board should be a party to it. As the Secretary of State [1] suggests, to throw Lufthansa's application into the pending United States-Caribbean-South America investigation, the so-called South America Route case, would delay—probably for years—executive action implementing the agreement. It was precisely to prevent this type of embarrassment to the conduct of our foreign affairs that the Congress denied judicial appeal from Board action on international routes. 72 STAT. 795, 49 U.S.C. § 1486(a). See *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948). What this court said in *British Overseas Airways Corp.* v. *CAB.*, 113 U.S.App.D.C. 76, 77, 304 F.2d 952, 953 (1962), is applicable to this case: "The prohibition [against appeal] cannot be circumvented by the expedient attempted here."

McGOWAN, *Circuit Judge, dissenting*: My respectful disagreement with the majority in this case extends both to

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[1] In his letter to the Attorney General with respect to this case, the Secretary of State states, in part:

> "It is our view that any substantial delay in the processing of Lufthansa's application, whether for a period of months or years, will severely compromise our interational aviation relations and will impair our ability to negotiate effective exchanges of air routes with other countries. Doubt would be cast on our reliability in complying with the obligations set forth in our bilateral agreements; the value of route grants by the United States to foreign carriers would be significantly reduced; and the operations of our carriers over routes granted by foreign countries would be subjected to dilatory or other retaliatory measures."

the merits of the order in question and our jurisdiction to review it. The court, working back from its conclusion on the merits, finds that it is without jurisdiction. There are, of course, situations in the law where this must be the order of inquiry. In my view, this is not one of them. Had I agreed with my colleagues on the merits, I still would have thought the order properly before us.

The reviewability of this order depends in the first instance upon its finality, and, secondarily, upon whether the Congress has, in Section 1006(a) of the Federal Aviation Act, expressly forbidden review of the order as one "subject to the approval of the President." The majority opinion appears to me to assume finality in the coventional sense, provided that petitioners in fact have an *Ashbacker* right. The difference may not be too important in terms of result here, but my own thought is that finality attaches in this case because the order effectively puts an end to petitioners' opportunity to press their claim of right to an *Ashbacker* determination, either on the record as it stood at the time the order was entered or after the receipt by the Board in the future of evidence on the exclusivity issue. The *Ashbacker* claim was hardly frivolous; and, thus, the order was appropriate for review, even though petitioners might be unable to establish their *Ashbacker* contentions to our satisfaction.

Section 1006(a) here contributes to finality.[1] It is urged upon us that petitioners could have submitted evidence

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[1] The order under review represents a procedural determination as to how certain applications are to be handled. It decides nothing with respect to the merits of the applications. Whether or not it is properly regarded as final rather than interlocutory for judicial review purposes, it does not constitute an order "subject to the approval of the President" within the reach of Section 1006 (a). That category is reserved for orders of the Board which are inextricably intertwined with the merits of the grant or denial of applications. Congress cannot be taken to have intended that the President pass upon the various procedural orders

on exclusivity in the hearings to be held upon the merits of Lufthansa's application and then argued to the Board for an alteration of its procedure in the light of such evidence. But certainly one outcome of the Section 402 hearing can be an order granting the application. That order would be one clearly subject to Presidential discretion; judicial review would be out; and petitioners would presumably be left only with a strong personal conviction of the justice of their *Ashbacker* position. The finality of administrative orders, for purposes of amenability to judicial review, is a highly practical concept. It derives meaning only from the immediate context. In the distinctive concatenation of circumstances in which petitioners found themselves upon the entry of the order before us, I have no doubt that they could seek relief here and that we were warranted in hearing them out, even though we might ultimately disagree with what they said.

However, I do not so disagree. I take *Ashbacker* to mean the following: Where a licensing agency has before

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made by the Board in the course of moving towards a recommendation on the merits. I do not find *British Overseas Airways Corp v. CAB*, 113 U.S.App.D.C. 76. 304 F.2d 952 (1962), to be to the contrary. There the Board initiated a proceeding looking toward the promulgation of a proposed regulation amending the conditions upon which a foreign air carrier permit was to continue to be held. The carrier's motion to dismiss the proceeding was denied, and review was sought here of that order. This court thought such review was barred by Section 1006(a), for the reason that the conditions upon which foreign air carrier permits are to be granted or withheld is ultimately a matter committed to the President's sole discretion. The court felt that it could not review the Board order in question without getting into the area of Presidential discretion. *BOAC* did not involve a claim of unfairness in respect of a procedural determination; it involved substantive issues, the resolution of which by this court would inevitably impinge upon the role assigned to the President by Congress. Conversely, how the Board schedules its hearings in this case does not infringe in any way upon the President's latitude of action in determing whether, or upon what conditions, to grant Lufthansa's application.

it at any one point in time two applicants for a grant which surrounding circumstances indicate strongly can justifiably be made only to one, it is not to go ahead and decide for the one before it hears the other. To do otherwise, said the Supreme Court, "may satisfy the strict letter of the law but certainly not its spirit or intent," and "deprives the loser of the opportunity which Congress chose to give him." These procedural limitations in the interest of fair hearing have been accepted as fully applicable by this court to applications by domestic air carriers under Section 401 of the Federal Aviation Act.[2] The question we now face is whether they also apply when the Board has before it apparently conflicting applications under Section 401 *and* Section 402, the latter being the provision made by Congress whereunder foreign air carriers, as distinct from United States flag lines, may seek authority to fly between the United States and foreign countries.

Although the foregoing is, I believe, an accurate formulation in general terms of the issue to be decided, it is the part of caution to bear in mind that the resolution of any *Ashbacker* problem cannot be divorced from the peculiar facts giving rise to it. This Court has said in *Delta* that *Ashbacker* is "a rule of substance and not a mere prescription of form," noting that the Supreme Court in its initial formulation avowed its concern to be with the "practicalities" of the particular case before it. 97 U.S.App.D.C. 46, 50, 228 F.2d 17, 21 (1955). Fair hearing in the administrative area is nothing if not a fluid concept, with its contours changing from case to case in accordance with the realities confronting the parties. The central reality faced by petitioners here is the Board's view, announced

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[2] *Delta Air Lines, Inc.* v. *CAB*, 97 U.S.App.D.C. 46, 228 F.2d 17 (1955). See, also, *Delta Air Lines, Inc.* v. *CAB*, 107 U.S.App.D.C. 174, 275, F.2d 632 (1959), *cert. denied*, 362 U.S. 969 (1960), and *Northwest Airlines, Inc. v. CAB*, 90 U.S.App.D.C. 158, 194 F.2d 339 (1952).

in its order initiating an investigation of the Latin American route situation, that the proliferation of foreign air carriers on the route served by petitioners appeared to make it desirable for one of them to have its route extended to New York and for the other to be eliminated. It is against this backdrop that one more in a long line of foreign carriers presents itself to the Board with a Section 402 application to serve the New York-South America route. The Board schedules that application for prompt hearing and presumably prompt disposition. It tells petitioners that their applications for single-line service from New York to Latin America will be heard later. [3]

I do not understand my colleagues as questioning the substantial, as distinct from the merely formal, impact of this proposed procedure upon petitioners. Their disposition not to interfere with the course the Board has determined to follow rests upon two foundations. One is essentially the idea that Congress did not intend that the Board, in considering an application by a foreign air carrier under Section 402, should concern itself with the effects of the granting of that application upon a domestic line currently seeking authority under Section 401 to serve the same route. This position seems implicit in the opinion's early reference to "the obligation of the Board as agent of the United States in connection with Lufthansa's application involves Presidential consideration of our international relations with Germany as they arise with respect both to

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[3] Some chronology may help to put the legal issue before us in perspective. The Board's order initiating an investigation of petitioners' routes and certificates was entered August 8, 1961. In response to what that order foreshadowed, petitioners filed applications to extend their service to New York in June and September, 1962, respectively. Lufthansa's application was filed February 27, 1964. This last application was set down for hearing to commence June 10, 1964, whereas petitioners were told that their applications would not be reached for hearing before January of 1965. The hearing for Lufthansa has been stayed by this court pending this appeal.

Lufthansa and American domestic carriers operating abroad." If "abroad" here is read as "Germany," as I think may fairly be said to be its import, the thesis seems to be that the Board has no significant aspect of the public interest to weigh under Section 402 other than that of the possible harm to be done to our international aviation interests in Germany if this application is denied. The implication is that to take a broader view of the public interest would be to countenance repudiation or frustration of the Executive purposes in entering into the 1955 agreement with the German Federal Republic.

The President cannot, of course, be repudiated or frustrated if he chooses not to be, since he is empowered by the statute, for any or no reason and without exposure to judicial scrutiny, to direct the Board to issue the requested authority to Lufthansa, despite any recommendation the Board might make to the contrary. But the argument seems to be that the Board was not intended by Congress to waste its time in an inquiry which might conceivably lead the Board to be so presumptuous as to recommend in the public interest a course of action contrary to that contemplated by an executive agreement. A President who had not negotiated the agreement in question, and a Congress which has no function with respect to the approval or disapproval of executive agreements, might each be of the view that the Board's conception of the entire public interest at any one point in time would be a useful element in the President's store of knowledge as he turns to the discharge of his responsibilities under Section 801.

Now there is no question but that our international relations are a highly important factor for the Board to take into account under Section 402. But it is not the only one, nor is there to be attributed to it, in my view, the almost overpoweringly dominant role contemplated by the majority opinion. It would have been very easy for Congress to make plain its purpose to make it so, if such purpose it had. Section 402 could clearly have said that,

where the President has made a commitment to another sovereign nation that a national of the latter designated by it shall be permitted to serve the United States, the only issue before the Board upon such an application is the fitness, willingness, and ability of the designee to provide the service and to observe our regulatory laws and regulations. Section 402 presently says as much. It also says more, namely, that the Board is to find, further, that the "transportation will be in the public interest."

Throughout I follow only the Board's reading of the statute. Its own concept of what it may do in passing upon an application under Section 402 is set forth at pp. 7-8 of its brief. A fair summary is as follows: Despite the provisions of Section 1102, directing the Board to act "consistently" with any international commitment, the Board "considers that it is not required to recommend issuance of a foreign carrier permit to the President merely because there is an agreement providing for such permit." The Board receives evidence in respect of each of the various standards set forth in Section 402. As to that of the public interest, it "normally" regards the predominant issue to be that of whether the application should be granted because of reciprocity considerations. But where it is asserted that the grant will be injurious to U.S. carriers, "hence contrary to the public interest," it weighs that adverse impact against the reciprocity benefits, and submits its findings and conclusions to the President so that "he has the benefit of the Board's views in determining what his action should be." The existence of a bilateral executive agreement is, in the Board's view, a "*prima facie* public interest factor pointing to the grant," and a "strong showing would be required to warrant a recommendation to the President that the application should be denied and the bilateral denounced."

This all seems to me to say that one who hopes to persuade the Board to recommend to the President the denial of a foreign air carrier permit contemplated by an execu-

tive agreement has something of an uphill road. But the way is there if he can make it, and the Board will, upon a "strong showing," tell the President that it believes the time has come to deny the permit and to denounce the agreement. I do not understand petitioners to be under any illusions as to the difficulties they face, or to be complaining about them. Their claim is, rather, that fair hearing comprehends the opportunity to mount the attack on a scale commensurate with the barrier to be breached.

With the relevant standards prescribed as stated above, Section 402 directs that public notice be given of the application, and that a public hearing be held, with participation in the latter contemplated to be accorded to "any interested person." The Board in this case has recognized its obligation in the latter respect by permitting the intervention of petitioners in the Section 402 hearing, and it tells us that it will receive evidence from them. But the Board also tells us that, by reason of the narrower scope which it places upon the concept of "public interest," petitioners will be limited in their showing to representations of the adverse economic effect upon them and, that upon a record so confined, the Board will proceed to formulate and transmit its recommendation to the President before it turns to the more leisurely labor of hearing petitioners' applications. My colleagues say in substance, and as the second base of their holding, that, even if the Board be deemed to be something more than a mere agent of the President in his conduct of our international relations with Bonn, this restricted hearing which the Board proposes to give petitioners is amply adequate to the objectives which Congress subsumed under the rubric of "the public interest."

Absent a more precise definition of that term than Congress has given us, I am not convinced that this is so, nor that the shadow of *Ashbacker* does not fall squarely across the procedure the Board has in prospect for the handling of these applications. The concept of the "pub-

lic interest," when used in a public utility licensing statute, immemorially and customarily comprehends, among others, such things as which of two or more competing applicants can render the best and cheapest service to the public. Until Congress says plainly that a consideration of this kind is not to enter into the exploration of "public interest" as that term is used in Section 402, I am disabled from saying that it is irrelevant. The Board, however, does not intend to afford petitioners an opportunity to make the affirmative case in support of their own applications until after its recommendation with respect to Lufthansa has gone to the President. By the time the Board hears, decides, and makes recommendations to the President with respect to petitioners' applications, the additional service provided by Lufthansa may be the last straw on the economic back which compels the Board to effectuate its preliminary determination that the market will not support both Panagra and Braniff. What consolation would there then be for petitioners, or for the travelling public, in the knowledge that both petitioners had demonstrated by affirmative evidence their ability to furnish a better and cheaper service than the foreign carrier? Is it conceivable that Congress intended that the President should know that before he acted on any of the Board's recommendations?[4]

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[4] The President has, of course, an absolute and unreviewable discretion to do as he pleases, and without stating his reasons, in accepting or rejecting the Board's recommendations in respect of international routes. What petitioners seek here, however, is a meaningful chance to try to persuade the Board that its recommendations to the President should be one way rather than another. That is not an insubstantial privilege, as anyone knows who is familiar with the phenomenon in large organizations of first-draft inertia. The Board is made up of Presidential appointees, presumably chosen for their expertise and because the President has confidence in their judgment. It is not to be assumed that a course of action recommended to the President by the Board is without significant weight in his deliberations.

I do not, of course, intimate any opinion that petitioners can in fact make such a showing. We are concerned here, however, with the scope and timing of administrative hearings, and not with their likely result. The Supreme Court in *Ashbacker* was not motivated by any conjecture that the aggrieved applicant would probably prevail if he could only stave off decision until the merits of his case were before the agency. It was impelled to the result it reached by its divination of the sense of Congress as to what would constitute a fair hearing under the special circumstances there present. I am not persuaded that the problem here arises in a setting so different as to justify a contrary appraisal of the legislative will.

Had the Board elected to follow a different plan and to hear both the 401 and 402 applications before making its recommendations to the President as to each, I doubt that a protest by any one of the applicants would be regarded by us as presenting any serious legal problem. What is argued in substance to us now by the Board is that it cannot so elect because it will take it too long to hear and pass upon petitioners' applications; and that the resulting delay will embarrass the President and the Secretary of State in their conduct of our relations with Germany. But *Ashbacker* appears to me to contemplate some delay as a price Congress was willing to pay for fairness; and there is nothing in this record demonstrating utter incapacity in the Board to minimize the asserted embarrassment to the Executive by proceeding to hear and determine these applications with greater dispatch than has perhaps been characteristic of major route proceedings in the past.

APPENDIX C

Order No. E-20794

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket 15073

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 6th day of May, 1964

DEUTSCHE LUFTHANSA AKTIENGESELLSCHAFT
(Lufthansa German Airlines)

Order

This proceeding involves the application of Lufthansa German Airlines (Lufthansa) for amendment of its foreign air carrier permit to extend its route beyond New York to Santiago, Chile, via the intermediate points Montego Bay, Jamaica; Kingston, Jamaica; Quito, Ecuador; Guayaquil, Ecuador; and Lima, Peru.

Braniff has filed a motion requesting that Lufthansa's application be deferred pending decision in the *United States - Caribbean - South America Investigation*, Docket 12895, (hereinafter referred to as the *Route Case*)—or, in the alternative, that Lufthansa's application be consolidated with that case for decision. Answers in support of Braniff's motion have been filed by Panagra and the Master Executive Councils of Pilots of Braniff, Panagra, and Pan American. Answers in opposition to Braniff's motion have been filed by Lufthansa and Bureau Counsel.

Braniff alleges that (1) the public interest factors inherent in the 402 permit case cannot be fairly weighed until a decision has been reached in the *Route Case* as to future U.S. authority in the markets in issue, (2) the competitive impact of Lufthansa's operations cannot be known or controlled, and the bilateral agreement cannot be com-

plied with, until the scope of the U.S. carrier operations has been resolved in the *Route Case,* (3) the bilateral agreement under which Lufthansa is seeking fifth freedom rights may have been improvident and should perhaps be revised, and (4) under the Ashbacker doctrine, deferral of Lufthansa's application is required as a matter of law.

Upon consideration of the pleadings and all the relevant facts, we have decided to deny Braniff's motion. Assuming, *arguendo,* that the *Ashbacker* Doctrine is applicable to this type of situation, there is no showing that the Braniff and Lufthansa applications are mutually exclusive as a matter of economics. Lufthansa's traffic in the markets for which Braniff has applied would constitute fifth freedom traffic for the German carrier, and Lufthansa's schedules would be subject to the capacity provisions of the bilateral agreement. Pursuant to the bilateral agreement, Lufthansa would be required to tailor its capacity offered between the U.S. and South America to the traffic demands between Germany and the South American points in question. As a result, Lufthansa's operations would not be primarily designed to accommodate the needs of New York-South American traffic, and its ability to compete with unrestricted carriers would be sharply restricted. In view of the foregoing, we are not persuaded that grant of Lufthansa's application would, as a matter of economic fact, preclude the subsequent grant of Braniff's application.

Moreover, we find no warrant for deferring Lufthansa's application pending decision in the *Route Case.* Assuming that the route pattern which finally emerges in the *Route Case,* is different from that which presently obtains, it does not follow that Lufthansa's application must await future resolution of the *Route Case.* The public interest aspects of the foreign air carrier application including the question of diversion from U.S. carriers can be adequately tested in the light of the existing service pattern. It is true that the competitive impact of Lufthansa's services may change

if the South American route pattern changes. However, Braniff has assigned no persuasive reasons why Lufthansa's application cannot be appraised in the light of present day circumstances. To the contrary, Braniff's arguments are addressed, for the most part, to the merits of the foreign carrier's application. Finally, we note that deferral or consolidation of Lufthansa's application would be inconsistent with both our statutory mandate to dispose of foreign air carrier applications as speedily as possible, and our express policy of giving expedited treatment to such applications.

In view of the foregoing, Braniff's motion will be denied.

ACCORDINGLY, IT IS ORDERED:

That the motion of Braniff to defer or, in the alternative to consolidate Lufthansa's application with the *Route Case* for decision, be and it hereby is denied.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1964

No. 18671

PAN AMERICAN-GRACE AIRWAYS, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

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No. 18672

BRANIFF AIRWAYS, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

• • •

Judgment

These cases came on to be heard on the record from the Civil Aeronautics Board, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that these cases are hereby dismissed for lack of jurisdiction.

Per Circuit Judge Fahy.

Dated: October 30, 1964

Separate concurring opinion by Circuit Judge Wright.

Separate dissenting opinion by Circuit Judge McGowan.